Supreme Court, U.S.
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No. 99-884

IN THE

Supreme Court of the United States

MILTON LEE LEVERETTE,

Petitioner,

v.

LOUISVILLE LADDER COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTIONS PRESENTED FOR REVIEW

(1) Should this Court grant the Petition to review the constitutionality of the Mississippi Products Liability Act when the constitutional challenge was raised after Petitioner lost the trial on the merits?

(2) Should this Court address the constitutional issue made the subject of the Petition when the case may be decided on other grounds: Petitioner's failure to comply with Rule 26 of the Federal Rules of Civil Procedure?

(3) Does the burden of proof in a manufacturing defect case under the Mississippi Products Liability Act allow manufacturers to make "private law"?

LIST OF PARTIES, PARENTS AND SUBSIDIARIES

The parties to the proceedings below were Petitioner Milton Lee Leverette and Respondent Louisville Ladder Company, Inc. Louisville Ladder Company, Inc. is a wholly owned subsidiary of Emerson Electric Co.

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The Petition presents no ground specified in Rule 10 of this Court. The constitutional issue the Petition professes to present is one of Petitioner's own invention. Petitioner's sole claim at trial — that the ladder made the subject of the case suffered from a manufacturing defect — failed because Petitioner offered no evidence that the ladder deviated from Respondent's manufacturing standards. The evidence offered by Petitioner might have supported a design defect claim except that: (1) Petitioner chose not to make such a claim; and (2) no evidence of an alternative design was presented as required by Mississippi law. In short, this case involves nothing more than the failure of Petitioner's evidence to match his legal theory. After losing the case at trial, Petitioner attempted to re-characterize this failure of proof as a constitutional issue. The untimely constitutional challenge made the subject of the Petition is frivolous. Consequently, Respondent requests that the Court deny the Petition for Writ of Certiorari to review the decision of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS AND ORDER BELOW

Some relevant Opinions and Orders are found in the Appendix to the Petition for Writ of Certiorari. However, the Petition does not include the basis for the trial court's exclusion of the testimony of Petitioner's expert and the granting of Respondent's Motion to Dismiss the case pursuant to Fed. R. Civ. P. 50. Included as Appendix "A" of this brief are pp. 304-321 of the trial transcript, which constitutes the opinion of the trial court concerning the admissibility of the expert testimony tendered by Petitioner and the trial court's ruling on Respondent's Rule 50 motion. Appendix "B" is the trial court's May 27, 1998 Memorandum Opinion and Order, which required Petitioner to satisfy the pre-trial disclosure requirements of Fed. R. Civ. P. 26 within 5 days.

STATEMENT OF JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1). The Court of Appeal's decision affirming the trial court's dismissal was issued on July 9, 1999. The Order denying rehearing by the panel or *en banc* was lodged on September 3, 1999. The Petition for Certiorari was filed on November 26, 1999.

RULE INVOLVED

In addition to the constitutional and statutory provisions cited in the Petition, Fed. R. Civ. P. 26(a)(2) is relevant to this case:

> **(2) Disclosure of Expert Testimony.**
>
> (A) In addition to the disclosures required by paragraph (1), a party shall disclose to other parties the identity of any person who may be used at trial to present evidence under Rules 702, 703, or 705 of the Federal Rules of Evidence.
>
> (B) Except as otherwise stipulated or directed by the court, the disclosure shall, with respect to a witness who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony, be accompanied by a written report prepared and signed by the witness. The report shall contain a complete statement of all opinions to be expressed and the basis and reasons therefor; the data or other information considered by the witness in

forming the opinions; any exhibits to be used as a summary of or support for the opinions; the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years; the compensation to be paid for the study and testimony; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.

(C) These disclosures shall be made at the times and in the sequence directed by the court. In the absence of other directions from the court or stipulation by the parties, the disclosures shall be made at least 90 days before the trial date or the date the case is to be ready for trial or, if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under paragraph (2)(B), within 30 days after the disclosure made by the other party. The parties shall supplement these disclosures when required under subdivision (e)(1).

COUNTERSTATEMENT OF THE CASE

This is a products liability claim under Mississippi law. Petitioner allegedly fell and was injured when a fiberglass extension ladder manufactured by Respondent broke.[1] The sole basis of Petitioner's Complaint was that the subject ladder broke due to a manufacturing defect. In discovery, in the Pre-Trial Order and in representations to the Court on

1. Defendant Louisville Ladder Company, Inc. is referred to "Louisville Ladder" as well as "Respondent". Plaintiff Milton Lee Leverette is identified as "Leverette" as well as "Petitioner".

the morning of trial, Petitioner's counsel steadfastly maintained that Leverette made no claim that the ladder was defective in design. Petitioner retained Dr. Shelby Thames, an expert in polymer science, to support the manufacturing defect theory.

The case proceeded to trial on June 8, 1999. On June 9, 1999, the trial court allowed Petitioner's expert, Dr. Thames, to testify, while reserving a ruling on objections raised by Respondent. The trial court granted Respondent's motion to exclude the testimony of Dr. Thames at the conclusion of the expert's testimony on two grounds. First, the Court found that the testimony of Dr. Thames was inadmissible under Federal Rules of Evidence 402 and 702. Dr. Thames was unfamiliar with Louisville Ladder's manufacturing standards and could not say that the subject ladder deviated from those standards as required to establish a manufacturing defect under Mississippi law. Second, the trial court emphasized that Petitioner's failure to comply with the pre-trial disclosure requirements regarding experts embodied in Fed. R. Civ. P. 26 constituted an independent basis to exclude Dr. Thames' testimony. Petitioner's counsel conceded that without Dr. Thames' testimony, Leverette could not establish a *prima facie* claim. The trial court granted Louisville Ladder's Motion for Judgment as a Matter of Law under Fed. R. Civ. 50 at the conclusion of Petitioner's case.

On June 11, 1998, two days after the trial, Petitioner filed a Motion for Reconsideration[2]. In asking the trial court to set aside its prior ruling, Petitioner did not dispute that Dr. Thames' testimony was inadmissible on the manufacturing defect theory or that Petitioner had failed to

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2. Appendix "D" to the Petition at 10a-13a.

satisfy the pre-trial disclosure requirements of Fed. R. Civ. P. 26. Instead, for the first time, Petitioner asserted that the manufacturing defect standard embodied in the Mississippi Products Liability Act, § 11-1-63(a)(1)(i), Miss. Code Ann. (1972, as amended)[3], is unconstitutional. This untimely constitutional challenge was summarily rejected by the Fifth Circuit.[4] It is this component of the Fifth Circuit's ruling which constitutes the sole basis for the Petition.

COUNTERSTATEMENT OF FACTS

Petitioner has not fairly or accurately recounted the facts and proceedings below. Respondent believes that the following summary offers a more balanced presentation.

A. Background

- On March 25, 1995, Petitioner was injured in the course of his employment as a cable installer/technician with Vicksburg Video. Leverette alleges that he had climbed to third rung from the top of a 28-foot fiberglass extension ladder manufactured by Louisville Ladder when the ladder broke causing him to fall.[5]

- The subject ladder was purchased by Vicksburg video and assigned to Leverette in February, 1994. Leverette testified that he used the ladder 50-100 times per week in the 13 months preceding his accident.[6]

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3. *See* Appendix "E" to the Petition, pp. 14a-17a.

4. *See* Appendix "A" to the Petition, p. 5a.

5. Tr. Vol. 6, pp. 28, 47.

6. Tr. Vol. 6, pp. 92-93; 104.

- Petitioner noticed a crack in the middle of the 14-foot base section of the fiberglass ladder several days before his accident.[7] Leverette report the crack to his supervisor, but elected to continue to use the ladder.[8] Petitioner chose this course of action despite having read explicit warnings on the product advising **"Never use a damaged ladder" and "Destroy ladder if damaged, worn or exposed to fire and chemicals".**[9]

- On February 26, 1997, Petitioner sued Respondent in the Circuit Court of Warren County, Mississippi. Louisville Ladder removed the case to the United States District Court for the Southern District of Mississippi, Western Division.

B. ANSI A14.5 (1992)

- The American National Standards Institute, Inc. published ANSI A14.5 (1992), Standard for Ladders — Portable Reinforced Plastic — Safety Requirements. ANSI A14.5 (1992) was the consensus standard for the design and testing of portable fiberglass ladders applicable at the time of the manufacture of the subject ladder.[10]

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7. Tr. Vol. 6, pp. 47-51; 95-96.

8. Tr. Vol. 6, pp. 48-50; 96-100.

9. Tr. Vol. 6, pp. 88-89; 100-101.

10. A complete copy of ANSI A14.5 (1992) is located in the record at Tr. Vol. 2, pp. 180-270.

- ANSI A14.5 (1992) also contains standards and testing procedures which relate to the manufacture of the fiberglass railing component of a ladder.

- The ANSI standard specifies the materials to be used in the manufacture of fiberglass (Section 7), the requisite physical and mechanical properties (Section 7.9), the tests which should be performed to evaluate the fiberglass (Section 7), and the minimum test results.

- ANSI A14.5 references in Section 7 standards developed by the American Society for Testing and Materials (ASTM), which, in turn, dictate how to perform tests for flexural strength and modulus, compressive strength and modulus, tensile strength and modulus, and notched izod impact strength.

- Mike Van Bree, a Louisville Ladder engineer, testified during the course of Petitioner's case in chief that the ANSI standards constitute the manufacturing specification utilized by Louisville Ladder with respect to the fiberglass railing component of Respondent's product.[11]

- In short, in this case the ANSI specifications amounted to more than an industry design standard; ANSI A14.5 (1992) was the benchmark by which Louisville Ladder measured the quality of the fiberglass railing it used in the production of ladders.[12] So long as the fiberglass

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11. Tr. Vol. 7, pp. 197-199.

12. The Petition cites several cases for the proposition that industry standards are not dispositive on the issue of liability. *See* Petition, pp. 7-8. While these cases correctly state the law in a design defect claim, they are irrelevant to this manufacturing defect case where ANSI A14.5 (1992) is Respondent's manufacturing specification.

railing met ANSI A14.5, there was by definition no deviation from Louisville Ladder's manufacturing specifications and no manufacturing defect.

C. Petitioner Chose to Proceed Solely on a Manufacturing Defect Theory

- The Mississippi Products Liability Act ("MPLA"), § 11-1-63, Miss. Code Ann. (1972, as amended), recognizes four theories of recovery: (1) design defect; (2) failure to warn; (3) express warranty; and (4) manufacturing defect.[13]

- Proof of an alternative design is an essential element of a design claim under the MPLA. *See* § 11-1-63(f)(ii), Miss. Code Ann. (1972, as amended). In response to written discovery Petitioner stated he did not allege the ladder in question had a design defect because he could not identify an alternative design.

- A product has a manufacturing defect under the MPLA if it "deviated in a material way from the manufacturer's specifications or from otherwise identical units manufactured with the same manufacturing specifications." Section 11-1-63(a)(i)(1), Miss. Code Ann. (1972, as amended).

- In order to ensure that there was no confusion at trial over Petitioner's theory of the case, Respondent filed a motion in limine to exclude any evidence regarding a design defect, warning or warranty claim.[14] The following exchange took place when the motion in limine was addressed on the morning of trial:

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13. *See* Appendix "E" of Petition, p. 14a.

14. Tr. Vol. 5, pp. 883-884.

THE COURT: The issue is what road does the plaintiff travel? Does the plaintiff travel the manufacturing defect road, does the plaintiff travel the design defect road or the negligence path? Which one? I'll hear from Mr. Sessums and Mr. Varner on that in due course. The second motion in limine, you have a motion in limine to exclude any evidence regarding the design defect, any warnings, testimony or consideration of any warranty claim. What does Mr. Sessums say to that?

MR. SESSUMS: Your Honor, our whole case from the start has always been there was a manufacturing defect, that the polymer didn't bind to the fiberglass that occurred in the manufacturing process that the made the product inherently unsafe . . . We're not going to try how to design ladders. We're not going to talk about negligence.

THE COURT: That motion will be sustained. It's not being urged by the plaintiff, that theory (design defect theory).[15]

D. Dr. Shelby Thames' Opinion

- Petitioner retained Dr. Shelby Thames, a polymer science expert, to evaluate the subject ladder.

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15. Tr. Vol. 6, pp. 3-4.

- Dr. Thames' opinion was based upon four examinations or tests on the subject ladder: (1) a Differential Scanning Calorimetry; (2) a Thermographic Analysis; (3) an examination using an Environmental Scanning Electron Microscope; and (4) a three-part bend or flexural test.[16]

- The use of the Differential Scanning Calorimetry, Thermographic Analysis and Environmental Scanning Electron Microscope by Dr. Thames were neither based upon nor have any relevance to the ANSI A14.5 manufacturing specification employed by Louisville Ladder.[17]

- The three point bend evaluation conducted on samples of fiberglass taken from the railing of the ladder were similar to but not identical to the testing procedure utilized in ANSI A14.5 (1992). The strength exhibited by the fiberglass samples in Dr. Thames' testing exceeded the strength requirements imposed by ANSI A14.5 (1992).[18] In short, according to Dr. Thames' own testing, the fiberglass railing of the subject ladder met Louisville Ladder's manufacturing standard.

- The Differential Scanning Calorimetry and Thermographic Analysis were designed to determine whether the fracture of the railing was caused by thermal instability. Dr. Thames' tests were negative; the railing contained no thermal instability.[19]

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16. Tr. Vol. 2, pp. 176-178.

17. Tr. Vol. 7, p. 188.

18. Tr. Vol. 7, p. 201.

19. Tr. Vol. 2, pp. 176-178.

- The Environmental Scanning Electron Microscope provided Dr. Thames with nothing more than a magnified view of the fiberglass. Based upon his subjective examination using the Environmental Scanning Electron Microscope, Dr. Thames concluded that the ladder possessed a manufacturing defect because the reinforcing fibers allegedly did not properly adhere to the polymer.[20]

- Dr. Thames testified that he did not make any effort to determine if the ladder met Louisville Ladder's manufacturing specifications:

  Q. Dr. Thames, you are aware, sir, that the allegations in this case are that the ladder involved in Mr. Leverette's accident had a manufacturing defect.

  A. I think I said that.

  Q. Do you know what L.L.'s manufacturing specifications are that they use and that they follow in manufacturing fiberglass extension ladders?

  A. No sir, that's not important to me. . . .

  Q. And in this particular case, Dr. Thames, you have never made any effort to determine whether the ladder involved in this particular case met L.L.'s manufacturing specifications.

  A. That's correct.[21]

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20. Tr. Vol. 7, pp. 266-267; 275-276.

21. Tr. Vol. 7, pp. 235-237.

E. Petitioner's Failure to Comply with Fed. R. Civ. P. 26

- Pursuant to Fed. R. Civ. P. 26(a)(2) and the Uniform Local Rules for the Southern District of Mississippi, Petitioner was required to produce (1) a list of cases in which Dr. Thames had testified at trial or by deposition within the preceding four years, and (2) the amount Dr. Thames had been paid for his services.

- Petitioner did not provide the required information.

- Louisville Ladder moved to exclude the testimony of Dr. Thames based upon Fed. R. Evid. 702 and 703 and Petitioner's failure to provide the requisite disclosure.

- On May 27, 1998, the trial court entered a Memorandum Opinion and Order [illegible]nying Respondent's motion to exclude Leverette's expert based upon the Federal Rules of Evidence. The Order allowed Petitioner five days to provide the necessary expert disclosure, absent which the Court would revisit Louisville Ladder's motion to exclude.[22]

- Petitioner ignored the Court's Order.

- At trial, Louisville Ladder re-urged its motion to prohibit Dr. Thames from testifying based upon Petitioner's failure to comply with Rule 26, the local rules and the Court's May 27, 1999 Opinion and Order.

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22. *See* Appendix "B" to this Brief, pp. 26a-27a.

F. Dismissal by the Trial Court

- The trial court excluded Dr. Thames' testimony because Petitioner's expert did not address whether the ladder had a manufacturing defect as defined by the MPLA:

> I will say that notwithstanding the expertise of Dr. Thames as a polymer scientist, he did say quite candidly that he's not familiar with the specs of the Louisville Ladder Company. He's not familiar with the ANSI standards. He is — he's not an expert in ladders. That's not to say he has to be an expert in ladders. But when you put it all together and consider it as a whole, I think there's a failure here to meet the statutory requirements.
>
> Now, so what we have essentially is the raw opinion of an eminently qualified man in his field, but the raw opinion without the necessary statutory components: Did the product meet the manufacturer's specifications? Don't know. Did the product differ from otherwise identical units? I don't know.
>
> I don't see how in the world I could possibly allow the testimony and do my job because I am absolutely convinced that a court of review will send it back to me on the fastest thing smoking coming this way after they read it because of this.[23]

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23. *See* Appendix "A" to this Brief, pp. 5a-6a.

- Additionally, the trial court precluded Dr. Thames from testifying due to Petitioner's failure to comply with the pre-trial disclosure requirements of Fed. R. Civ. P. 26 and the trial court's May 27, 1999 Order:

> I'm just simply going to say in this case that the failure to produce these cases and the follow up on the court's order, wherein I did direct there be within five days a submission of the cases, standing alone, that is not the reason for my ruling; but I do have to consider that, and I do consider that as one of the reasons in support of my decision here this afternoon . . .
>
> Rule 26 is a rule that we all must follow; and when we don't follow it, sometimes judges give us some additional time, and that was done in this case. But as I say, I'm looking — ladies and gentlemen, I'm looking to the overall picture, the big picture, rather than trying to pick out one little aspect here and one little aspect there. I'm looking at the big picture, and the big picture tells me that the only thing I can do is to sustain the objection and strike the testimony of the witness and instruct the jury to disregard.[24]

- Petitioner's counsel conceded that Petitioner could not make out a *prima facie* case absent the testimony of Dr. Thames.

- Petitioner rested after the exclusion of Dr. Thames' testimony. The trial court granted Louisville Ladder's motion to dismiss.

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24. *See* Appendix "A" to this Brief, p. 7a.

REASONS FOR DENYING THE WRIT

I.

THE CONSTITUTIONAL CHALLENGE MADE THE SUBJECT OF THE PETITION IS UNTIMELY

Petitioner's case was dismissed because he could not prove a manufacturing defect as defined by the plain language of the MPLA. Two days after the trial, Leverette asserted for the first time that the MPLA was unconstitutional in his motion for reconsideration. The Petition strains credulity in attempting to transform Leverette's delay into prompt action. According to the Petition, Leverette mounted a constitutional challenge "[i]mmediately upon realizing the District Court's interpretation of 11-1-63(a)(i)(1)"[25] of the MPLA. This assertion is nonsense. There could be no surprise in the trial court's interpretation of the MPLA to require Leverette to establish that the ladder "deviated in a material way" from Louisville Ladder's specifications because there is no other reasonable interpretation of this straightforward and uncomplicated statute.

The Fifth Circuit summarily dismissed Petitioner's untimely constitutional challenge. The Fifth Circuit panel noted that, absent exceptional circumstances, the appellate court would not consider an issue raised for the first time in a motion for reconsideration.[26] The panel unanimously held that no such exceptional circumstances were presented by

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25. Petition, p. 8.

26. *See* Appendix "A" to the Petition, p. 5a; *citing Browning v. Navarro*, 894 F.2d 99, 100 (5th Cir. 1990).

this case and no member of the Fifth Circuit concluded that rehearing was warranted. The Petition presents no legitimate claim that the Fifth Circuit misapplied the law. There can be no doubt that an untimely constitutional argument will ordinarily be ignored on appeal. In the end, the question the Petition presents is whether the judges of the Fifth Circuit abused their discretion in refusing to consider Petitioner's constitutional argument on the merits. This fact-intensive determination is simply not worthy of review by the Supreme Court of the United States.

II.

THIS COURT SHOULD NOT ADDRESS THE CONSTITUTIONAL ISSUE MADE THE SUBJECT OF THE PETITION BECAUSE THE CASE MAY BE DECIDED BASED UPON PETITIONER'S FAILURE TO COMPLY WITH FED. R. CIV. P. 26.

It is well-settled that a constitutional question should not be addressed when the issues in a case are such that the case may be decided on other grounds. *Trembling Prairie Land v. Verspoor*, 145 F.3d 686 (5th Cir. 1998); *Felder v. McCotter*, 765 F.2d 1245 (5th Cir. 1985), *cert. denied*, 475 U.S. 1111 (1985). This case squarely presents a basis for the exclusion of Dr. Thames' testimony which is unrelated to Petitioner's constitutional challenge. Petitioner failed to comply with the pre-trial disclosure requirements of Fed. R. Civ. P. 26(a)(2) and the trial court's May 27, 1999 Memorandum Opinion and Order regarding expert discovery. This failure was cited by the trial court as a basis for Dr. Thames' testimony.[27]

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27. *See* Appendix "A" to this Brief, p. 7a.

The Petition does not address the trial court's finding that Petitioner's violation of Rule 26 and the trial court's own order justified the exclusion of Dr. Thames' testimony. Thus, even if the court granted the Petition and subsequently determined that the MPLA is unconstitutional, the trial court's exclusion of Dr. Thames would be unaffected. Under the circumstances, no purpose is served by the granting of the Petition.

III.

THE BURDEN OF PROOF IN A MANUFACTURING DEFECT CASE UNDER THE MPLA DOES NOT ALLOW MANUFACTURERS TO MAKE PRIVATE LAW

Under the MPLA a plaintiff may establish that a product had a manufacturing defect by proving that "it deviated in a material way from the manufacturer's specifications or from otherwise identical units manufactured with the same manufacturing specifications." Section 11-1-63, Miss. Code Ann. (1972, as amended). The standard employed by the MPLA was taken from § 402A of the Restatement (Second) Torts and represents no change from prior Mississippi law. McIntosh, Phillip, *Tort Report in Mississippi: An Appraisal of the New Law of Products Liability, Part II*, 17 Miss. Col. Law Rev. 277, 308 (1997). This same standard is consistently employed by courts throughout the United States in manufacturing defect cases.[28] Thus, in reality, the petition

28. *See, e.g., In re: TMJ Implants Products Liv. Lit.*, 872 F. Supp. 1019, 1024 (D. Minn. 1995) ("A manufacturing defect exists only where an item is substandard when compared to other identical units off the assembly line."); *Jones by Jones v. Ledderly Labs*, 695 F. Supp. 700, 706 (E.D. N.Y. 1988) ("A defectively

(Cont'd)

challenges more than a simple provision of the MPLA. Instead, Leverette contends that the manufacturing defect standard employed uniformly throughout the country is unconstitutional.

Petitioner's constitutional argument is absurd. In presenting the argument, Petitioner sets up a straw man: If manufacturers can set their own manufacturing standards they can produce substandard products with impunity.[29] The Petition proceeds as if proof of a manufacturing defect is the sole basis upon which a manufacturer can be sued. Petitioner conveniently ignores the fact that the manufacturer of a substandard product could be subjected to a claim that the product was defective in design. The MPLA allows precisely such a claim. Petitioner elected to proceed only on a manufacturing defect theory.

Leverette contends that the MPLA is a "private" or "special" law in that each manufacturer is to allow to set the manufacturing specifications for its products. This allegation

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(Cont'd)

manufactured product deviates in some material way from its design or performance standards."); *Ashley v. General Motors Corp.*, 666 So. 2d 1320 (La. Ct. App. 1996); *Richcreek v. General Motors Corp.*, 908 S.W.2d 772, 776 (Mo. Ct. App. 1995) ("Simply put, a manufacturing defect occurs when 'something goes wrong in the manufacturing process and the product is not in its intended condition.' The product is evaluated against the producer's own standards, and compared to like products.") (citations omitted); *Nerud v. Haybuster Mfg., Inc.*, 340 N.W.2d 369, 373-74 (Neb. 1983) (A manufacturing defect is one "in which the product differs from the specifications and plan of the manufacturer."

29. *See* Petition, pp. 9-10.

is untrue because the MPLA operates uniformly on all persons and corporations subject to its operation. *See, e.g., Secretary of State v. Wiesenberg*, 633 So. 2d 983 (Miss. 1994); *Loden v. Mississippi Public Service Commission*, 279 So. 2d 636 (Miss. 1973). Every citizen who wishes to pursue a products liability claim must prove the elements outlined in the MPLA. Similarly, every manufacturer will be responsible for damages if an injured plaintiff can meet the criteria articulated in § 11-1-63 of the Mississippi Code.

Petitioner's expert testified that there was inadequate binding between the reinforcing fibers and the resin of the fiberglass railing of the subject ladder, but he could not establish a manufacturing defect because he had no evidence that the subject ladder deviated from Louisville Ladder's manufacturing specifications. The evidence offered by plaintiff would have established a design defect, except that: (1) Petitioner chose to not make such a claim; and (2) Leverette had no evidence of an alternative design. In the end, this case involves a simple failure of proof in a products liability case, not a constitutional issue and certainly not an issue worthy of review by this Court.

CONCLUSION

For the reasons given above, the Petition should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX A — EXCERPTS OF TRIAL TRANSCRIPT DATED JUNE 8-9, 1998

* * *

THE COURT: All right, sir. The ruling of the court is as follows and for the following reasons. As a prelude, let me say I haven't had a chance to take the time necessary to give a very cogent and well-expressed opinion on this issue. I would have had time to do so if I would have rendered this opinion tomorrow morning and have tonight to perhaps get my thoughts better organized.

But let me say preliminarily that the law of products liability is a moving target. It has been a moving target for some time. We have a proliferation of cases on our dockets involving all kinds of failures and design defects and manufacturing defects and all kinds of products throughout the manufacturing industry from baby rattlers to 18-wheelers to jet aircraft and everything also.

It seems to me that the Mississippi legislature codified the law when it did, not many years ago, borrowing from 402(a), the restatement pretty much in its entirety with some minor changes. But at any rate, the legislature codified and adopted statutes or a statute which deals with products liability, and it sets up certain parameters. There haven't been many cases dealing with this statute. There have been hundreds of cases dealing with common law on this subject but not that many dealing with the statute.

I don't agree with Mr. Sessums when he says that if I, as a district judge in this case, follow this statute, then the plaintiff simply cannot prove his case. I disagree with that,

and I disagree with it for this reason: The expert — let me say initially Dr. Thames is a very qualified, eminently qualified expert, a recognized expert in this state and throughout this country in his field of polymer science, chemical engineering and chemistry. And I have great admiration for Dr. Thames for several reasons, first of all, because of his record and second of all because he didn't come into this court and try to manufacture something. He came into this court and told it exactly like he sees it.

Now, we have all seen experts. Experts are out there in every field; and for a certain sum of money, you can find an expert who will tell you what you want to hear. Experts are excluded all the time from federal court and state court by judges who look at what they are saying and try to decide is this a viable scientific theory or is it just guesswork, speculation or something that comes off the typewriter of this person. Here Dr. Thames has, in my opinion, been very forthright and very honest in his opinion. As I said, I have great respect for him.

But to get back to the point. There are two roads you can travel, and I've used that metaphor three times or four times now. You can travel the manufacturing defect road or you can travel the design defect road, but you have got to travel one or both. And here it seems to me that the plaintiff has been unable to travel either for whatever reasons there may be. Maybe the facts don't underwrite the opinion that the plaintiff needs to be able to get this case to a jury.

Let's talk about both of them. We've talked about the design defect. The design defect the statute says specifically

that that's — there must be an alternative design, and there has been none proffered in this case, either in discovery or at trial. And so we move to the manufacturing defect because that's the approach that the plaintiff has elected to take and to concentrate on. And plaintiff's expert, in his opinion, said that there is a defect in the manufacturing process. But the statute says and Mr. Sessums recognizes, at least by implication, that there are parameters that the restatement and that the codification of the law by the Mississippi legislature have established, and those requirements are that the product did not meet the manufacturing standards or the manufacturer's specifications or, secondly, that the product differs from otherwise identical units.

Now, if you follow what Mr. Sessums has said, he says, if we can't show that, then we're out of the ball game. We can clear the park. But that's not really so because that's why you have the design defect approach. That's why you have design defect. This statute covers all possibilities, and it was intended to cover all possibilities, and it was you don't — if you don't have an error at the press or at the mold or at the plant, if you don't have an error right there as to one particular product, one particular automobile, one particular tire or in this case one ladder, then you go to the design defect and you show reasonable alternatives or alternative design.

I am quite confident there are cases that will fall through the cracks in this statute, but what I have before me is a statute telling me to apply two rules when you're dealing with a manufacturer's defect, and I have spoken to them already.

So when you consider this equation, why is this product defective or why is this product dangerous or why doesn't it meet the standards. You have two routes that you can take. You can take one or perhaps even both; but in this case, I don't think the plaintiff has taken either one. And it's not through any fault of counsel necessarily or any fault of the expert because this man testified to what he thought was right under the conditions, and his testimony was really sort of a res ipsa loquitur concept because he said. You've got a broken ladder; something caused it and we put it under a microscope and it was weak right here and the polymer didn't bond and this is what caused it, but that's not going far enough.

It's not going far enough under the statute. Daubert took up a good part of the defendant's brief or briefs, but I'm not going to go into an elaborate dissertation, if I can use that term to sound self-serving, but an elaborate statement, shall I say, on Daubert. It's not necessary here. Daubert is always pertinent, I think, because our courts have said Daubert applies not only to a scientific theory, but it also deals with just the mechanic who comes up and testifies. Look I've been dealing with carburetors all my life. This car didn't pass the other car because when he put the gas to it, the float didn't work; and the float didn't work because they had a screw made out of plastic instead of metal. A mechanic can testify, but when he testifies and he qualifies as an expert, you still put the Daubert test to him. You do in this state and in this circuit. You don't in all circuits but you do here.

The purpose of Daubert, it seems to me, was to liberalize the rules, to allow the experts more leeway to testify and not

just apply one standard, which came out under Frey but rather to apply a variety of standards according to the justice who wrote the opinion and all the judges that signed off on it, Justice O'Connor.

And if you apply Daubert, in my opinion this case would probably not meet the Daubert standards now that I've heard all of the evidence — the purported testimony. We dealt with Daubert in our memorandum opinion; and at that time, I had every reason to believe that this was going to be a design case and that an alternative design might be the approach that would be taken. Had I known then what I know now, I probably would have granted summary judgment. The design aspect of it has been negated, and I understand the reasons why.

So where does that leave us? I will say that notwithstanding the expertise of Dr. Thames as a polymer scientist, he did say quite candidly that he's not familiar with the specs of the Louisville Ladder Company. He's not familiar with the ANSI standards. He is — he's not an expert in ladders. That's not to say he has to be an expert in ladders. But when you put it all together and consider it as a whole, I think there's a failure here to meet the statutory requirements.

Now, so what we have essentially is the raw opinion of an eminently qualified man in his told, but the raw opinion without the necessary statutory components: Did the product meet the manufacturers specifications? Don't know. Did the product differ from otherwise identical units? I don't know.

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I don't see how in the world I could possibly allow the testimony and do my job because I am absolutely convinced that a court of review will send It back to me on the fastest thing smoking coming this way after they read it because of this. And again, I hasten to say again and be repetitious that I don't chastise anyone for that. I think it's just the way the case unfolds.

Now, let's talk about Rule 26, my view of that Rule 26 is very specific. It tells you what, what a lawyer must do and a plaintiff or a defendant must do in producing the name of an expert. There are requirements that must be met, and one of those things is that you must give the names of the cases.

I don't have the written rule, but I believe it says that. It says here that there shall be provided a list of any other cases that the witness has testified in as an expert at trial or by deposition within the preceding four years. Now, that was not done. And I have tried to analyze for you and for myself what this failure means to the defendant and to this court and what should be done about it.

This is a discretionary matter with the court, and the court could sustain the objection to the plaintiffs expert based on that alone, I did not do that. I did not do that because I wanted to give the plaintiff every opportunity to show me how it was unimportant or how the failure to respond should be overlooked.

And perhaps if the expert had reached the necessary threshold on other issues, then I would overlook or somehow try to justify this failure. I don't like to sanction attorneys.

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On one occasion there was sort of a spontaneous sanction that I granted or imposed upon one lawyer who was disrespectful to me and to the court. I don't like to do that. I hope I never have to do it again, and I'm certainly not going to do it with these lawyers because they are all very respectable and very professional, but — and I'm talking about monetary sanctions. I don't like monetary sanctions. I like to stay away from them, and I'm not going to do that.

I'm just simply going to say in this case that the failure to produce these cases and to follow up on the court's order, wherein I did direct that there be within five days a submission of the cases, standing alone, that is not the reason for my ruling: but I do have to consider that, and I do consider that as one of the reasons in support of my decision here this afternoon.

There's no need for me to address what I would have done had there not been this other problem that I've addressed.

Rule 26 is a rule that we all must follow, and when we don't follow it, sometimes judges give us some additional time, and that was done in this case. But as I say, I'm looking — ladies and gentlemen, I'm looking to the overall picture, the big picture, rather than trying to pick out one little aspect here and one little aspect there. I'm looking at the big picture, and the big picture tells me that the only thing I can do is to sustain the objection and strike the testimony of the witness and instruct the jury to disregard.

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The reason I took it in front of the jury is because I realize that this is the only expert the plaintiffs have got, and without an export their case probably fails. Had there been other experts, I would not have done it that way. I would have taken the time, the necessary time, to have the jury sit out while we flesh all of this out.

But because of the fact that there's only one expert, I chose to do it this way. And let me say this: This is not the first time that we've had a case fail from the plaintiff's view based upon this statute and based upon the inability of a plaintiff to rise to the necessary level.

I had a case in Biloxi not long ago very similar or to this, and I granted a Rule 50, and I granted it for the same reason that I have stricken the testimony of Dr. Thames.

That's the ruling of the court, gentlemen. And we can proceed — I look to the plaintiff for his responses to how we're going to proceed from this point on.

MR. SESSUMS: If it please the court, we have other witnesses to call; but when we get to the conclusion of those — that testimony — we have three employees from Vicksburg Video to testify as to there was no abuse of the ladder as to the crack or no crack in the ladder, the inspection of the ladder by the supervisor. And we have some doctors' depositions left and the plaintiff's wife left, and that would conclude our testimony. But even at the conclusion of that testimony, that's not going to get us past the provisions of the code section just referred to by Your Honor.

So I don't know procedurally where exactly that leads us. It's a futile thing to do. I don't want to say we want to quit and go home now and take it up to the Fifth Circuit. But the net effect is when we get through doing that, that's what Your Honor is going to have to do without Dr. Thames' testimony.

THE COURT: Well, by way of guidance I can tell you what happened in the case in Biloxi, not that you want to do what that attorney did. But he called — he did exactly what you said. He made a proffer. And in his proffer he said that we have other witnesses, none of which would go to the gravamen of the case, that is, was the product defective or was there a defect: in the manufacturing process or in the design process. He conceded that for the record. He said we have other witnesses we do not choose to call them, but we're not waiving anything to be able to call them later.

He pondered his appeal, and he was going to take it from that point on because that's — that is the issue that was squarely before the court then; it's the issue squarely before the court now. And he decided to appeal or not to appeal. I don't know what happened to it. It's been some time ago, and his appeal time has since lapsed.

But what I'm saying to you is if you want to do that, if you want to step down now and take it up with Mr. Leverette and decide whether you want to appeal it and if you do take it to the Fifth Circuit, the Fifth Circuit may certify it to the Mississippi Supreme — the Supreme Court or they may affirm it or they may send it back to me and tell me to study my lesson better. So it's up to you, Mr. Sessums. You're not

going to waive it by doing what you want to. I'm not urging you one way or the other.

There would have to be a motion for a Rule 50 by the defendant, which there would be if you decided not to call any witnesses at this time. Based on the record before me I would affirm that motion.

MR SESSUMS: Judge, I —I think by way of proffer, we would offer that we would call Gene Johnston —

THE COURT: All right, sir.

MR. SESSUMS: — to testify — this is by way of proffer. We're not going to call him. That he would testify that the ladder in question had been used by Vicksburg Video for some 13 months, that —

MR. BROWN: Your Honor, as a suggestion, we might proffer their depositions.

MR SESSUMS: No. Your Honor, I had rather make a proffer rather than the deposition testimony taken by the defendants. Gene Johnson, if called to testify would testify that Lee Leverette was a good, model employee of Vicksburg Video, that he took care of his equipment, that Lee's job attendance was excellent, that his work attitude was excellent, that he hired him back after the injury, that Lee Leverette returned to work and tried to work but could not do the light duty work, that Lee Leverette could not do light paperwork. He could tell he was hurting, that Vicksburg Video uses Louisville Ladders exclusively, that he had never in he life seen a break on a ladder like this before.

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We would also call Danny Whitaker, who was Mr. Leverette's supervisor. If he testified, Mr. Whitaker would be expected to testify that Lee Leverette was a good employee, was safety conscious, that Lee Leverette was conscious of others' equipment and safety, that Lee never misused his equipment, that he reported what he thought was a crack, that Mr. Whitaker's duties as a supervisor when something like this occurred would be to make an immediate inspection of the ladder, which he did, that he made an inspection of Mr. Leverette's ladder. He could find no crack whatsoever in the ladder.

He would be testifying of Mr. Leverette's work duties. He would be — Mr. Whitaker would testify as to how ladders were routinely and customarily stored. He would testify that he had never seen a break like this before. And on the ladder in question, that while the crack was reported possibly only in one leg, that both legs of the subject ladder broke.

When he inspected the ladder, Mr. Whitaker did not consider the ladder unsafe, that even if it had a slight hairline crack in it, he would not have considered it dangerous, that he would have gotten up on the ladder that he inspected there at Mr. Leverette's request.

We would also call Mark Doyle to testify as to the chain of custody of the ladder, that he identified the correct ladder to Dr. Thames and that the ladder went direct from the possession of Dr. Thames — from Vicksburg Video to Dr. Thames, that a section of the ladder had been cut off between the two visits by Dr. Thames by some unknown persons at Vicksburg Video.

Through Mr. Mark Doyle we would produce into evidence or offer into evidence an exemplar ladder actually used by Mr. Mark Doyle which has been used for several years now in excess of the time period Mr. Leverette used his ladder and that Mr. Leverette's ladder was in much better condition than the ladder Mr. Doyle is still using.

Lastly we would introduce the deposition testimony of the physicians listed on our witness list and in conclusion introduce the testimony of Ms. Margie Leverette who would testify as to the damages occasioned by — to her husband by the accident in question. That would conclude our proffer, Your Honor.

THE COURT: All right.

MR. SESSUMS: Lastly, Your Honor, we did have Dr. Gerald Lee from Mississippi College coming here tomorrow. And if allowed to testify or if tendered to testify, he would testify that Mr. Leverette, based upon his age, income at the time of the injury, inflation and other pertinent factors to be explained by Dr. Lee, that Mr. Leverette had a loss of future income as set forth in the — I think its 259,000 as set forth in our pretrial order. Thank you, Your Honor.

THE COURT: All right. Thank you. Do the defendants accept that proffer?

MR. SILVERSTEIN: Judge, we do not agree that that was an accurate recital of the witness' testimony. Frankly, I'm not sure — I've never heard a proffer being made with a lawyer standing up saying what a witness would say, but I

would simply submit that the best evidence as to what these witnesses would say would be their own depositions which have been taken. But for the record, I do not stipulate or accept his summary of the facts on those witnesses.

THE COURT: Well, I think the issue, Counselor, is whether or not you want him to put them on the stand and give you an opportunity to cross-examine. I think that's the issue that we're dealing with here. There may be some variance between what the witness said in his deposition and what Mr. Sessums' recollection of it is. And it wasn't to purposely mislead, I'm sure, but there may be some variance there.

But the issue is: He has made a proffer really to expedite the trial more than anything else, sort of a procedural thing, saying that this is what he would do. And then I don't see that it's necessary that you agree with what he said, but I think it is probably necessary — and it may not be necessary. Let me think through it. You can't require him to put on witnesses. He made a proffer primarily for the purpose of appeal. There's nothing in that proffer that's going to change my opinion regarding Dr. Thames. All right. There's nothing in that proffer that would give the plaintiff — would make a jury question out of this issue. So that's where we are essentially. Do you understand?

MR. SILVERSTEIN: Yes, sir, Judge, and I certainly have no objection with him proffering the witnesses' testimony in that vein. I just didn't want to be on the record as stipulating those as the facts in this case.

THE COURT: I understand there may be another trial some day and somebody might look back at this record and said you agreed to it then.

MR. SILVERSTEIN: That's what I'm saying. I have no objection to him proffering for the appeal, by making that statement. But I want the record to reflect we are not stipulating that is their testimony or that that's sort of — the witnesses if called to testify would offer those same facts.

THE COURT: With that, Mr. Sessums, what does the plaintiff say?

MR SESSUMS: We would rest at that point. Your Honor.

THE COURT: All right. Does the defendant have a motion?

MR. BROWN: Your Honor, Louisville Ladder moves for a judgment as a matter of law based upon Your Honor's ruling.

THE COURT: All right. The judgment as a matter of law will be granted under Rule 50 for the reasons heretofore stated and that is simply that this case without the testimony of an expert who meets the — who testifies under the statute and under the law and who opines to the extent that the case should be submitted to the jury, that is, gives substantial — gives evidence which rises to the level of creating an issue of fact and without that, the plaintiff's case fails. And that's something we have discussed earlier inasmuch as I have stricken the testimony of Dr. Thames.

All right. That will be the ruling of the court. I need to get the jury in, ladies and gentlemen, and to explain to them what has happened here. Does anyone wish to make a statement to me before I do that?

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APPENDIX B — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI, WESTERN DIVISION DATED MAY 19, 1998 AND FILED MAY 27, 1998

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
WESTERN DIVISION

NO. 5:97cv58BrS

MILTON LEE LEVERETTE

PLAINTIFF

VERSUS

LOUISVILLE LADDER CO., INC.

DEFENDANT

MEMORANDUM OPINION AND ORDER

This matter is before the Court on motion of the defendant, Louisville Ladder Co., Inc., to exclude the testimony of Shelby F. Thames, Ph.D. (docket entry # 50). After reviewing the motions, briefs, applicable statutory and case law, and being otherwise fully advised in the premises, the Court finds as follows:

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I. FACTS

In the present case, the plaintiff was injured when the ladder on which he was standing broke. The plaintiff subsequently filed suit against the defendant, alleging, among other things, that the ladder was defectively designed. According to the plaintiff's expert, the ladder broke because there was no adhesion between the fiberglass and the polymer matrix making up the ladder. When this occurs, according to Dr. Thames, the polymers will age and eventually become embrittled. The defendant filed the present motion, arguing that the Court should exclude the testimony of Dr. Thames because: (1) he is not qualified to offer expert testimony regarding the ladder at issue; (2) his opinions constitute speculation; and (3) his methodology is fundamentally flawed.

II. DISCUSSION

A. STANDARD

Under Rule 702 of the Federal rules of Evidence, an expert witness may testify if he is qualified and if "scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue. . . ." The Supreme Court discussed the standard for admitting expert testimony under the Federal Rules of Evidence in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). Although the *Daubert* Court limited its discussion to a scientific context, the *Daubert* analysis is equally relevant to expert testimony about non-scientific, technical evidence. *See Watkins v. Telsmith, Inc.*, 121 F.3d 984, 990-91 (5th Cir. 1997) (holding that *Daubert* analysis applies to testimony other than strictly scientific testimony).

Essentially, for expert testimony to be admissible it must be "not only relevant, but reliable." *Daubert*, 509 U.S. at 589. The "relevance" requirement ensures that an expert's opinion will be helpful to the trier of fact. *Weinstein's Federal Evidence*, § 702.05(2), 2nd Ed. (1997). The "reliability" requirement is designed to exclude so-called "junk science." *Daubert*, 509 U.S. at 593. This requirement ensures that knowledge offered is "more than subjective belief or unsupported speculation." *Id.* Expert testimony must be supported by "appropriate validation — i.e., 'good grounds,' based on what is known." *Id.* In assessing the validity of expert testimony, the court's focus should be on the expert's principles and methods used, not on his conclusions generated. *Id.*

While *Daubert* articulated standards for determining the reliability of expert testimony, the case "did not otherwise work a sea of change over federal evidence law." *United States v. 14.38 Acres of Land, Sit. in Leflore Cty., Ms.*, 80 F.3d 1074, 1078 (5th Cir. 1996). A trial court's "gate keeping" function does not replace the traditional adversarial system: "Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." *Daubert*, 509 U.S. at 596. Therefore, in determining whether to exclude expert testimony as unreliable, trial courts must act "with proper deference to the jury's role as the arbiter of disputes between conflicting opinions. As a general rule, questions relating to the bases and sources of an expert's opinion affect the weight to be assigned that opinion rather than its admissibility and should be left for the jury's consideration." *14.38 Acres of*

Land, 80 F.3d at 1077 (quoting *Viterbo v. Dow Chemical Co.*, 826 F.2d 420, 422 (5th Cir. 1987)).

In the present case, Dr. Thames has opined that the ladder at issue was defectively designed. His opinion is based largely on an examination he made of the ladder utilizing an electron microscope. An electron microscope is capable of magnifying an image hundreds of thousands of times. Using the electron microscope, Dr. Thames looked at both the failed sections of the ladder and at other sections. Dr. Thames explained that the results of the electron microscope showed that fiberglass strands that were used to reinforce the material were not properly adhered to the polymer matrix. Dr. Thames explained that the ladder in question was a composite ladder made up of more than one material and that the composites work in harmony to provide strength.

He explained that the polymer is the continuous phase of the ladder which is supposed to bond to the fiberglass strands placed into the polymer to provide additional strength. He further explained that in order for this bonding to occur, and for the additional strength to be achieved, there has to be adhesion between the polymer matrix and the fiberglass strands. When there is no adhesion between the fiberglass strands and the polymer, the property of the polymer is actually degraded. Dr. Thames explained that his examination of the ladder in question showed no adhesion between the polymer and fiberglass strands.

In explaining his findings, Dr. Thames referred to an example from an academically recognized textbook. *Polymer Microscopy*. Samples of the ladder, according to Dr. Thames,

were almost mirror images of the examples from this textbook showing examples of no adhesion versus examples of adhesion. He testified that this showed beyond a shadow of a doubt that there was no adhesion between the polymer matrix and the glass-filled rod.

As mentioned, the defendant objects to the testimony of Dr. Thames, arguing that (1) he is not qualified to offer expert testimony regarding the ladder at issue; (2) his opinions constitute speculation; and (3) his methodology is fundamentally flawed. The Court will address each of these objections in turn.

1. QUALIFICATIONS

The plaintiff's expert, Dr. Shelby Thames, has been hired as an expert in polymer science. Dr. Thames holds a B.S. Degree and a Masters Degree in Chemistry from the University of Southern Mississippi and a Ph.D. in chemistry from the University of Tennessee. Dr. Thames has been a professor for the University of Southern Mississippi since 1964, having taught courses in freshman chemistry, analytical chemistry, organic chemistry at the undergraduate and graduate levels and graduate courses in polymer science. In 1970, Dr. Thames formed the Department of Polymer Science at USM.

Initially, the defendant argues that Dr. Thames is not qualified in the present action because he has never done any work pertaining to ladders. In its brief, the defendant states:

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> Dr. Thames has never been employed in any capacity other than as a professor at the U.S.M.. More particularly, he has never worked for a company or entity that has designed, manufactured or tested a ladder. He has also never been employed by a company that has designed, manufactured or tested a fiberglass product. Additionally, he has never written or published any articles, books or treaties (sic) on ladders or fiberglass products.

In support of this contention, the defendant cites an unpublished opinion out of the Western District of Michigan. *See Fayas v. Louisville Ladder Corp.*, Civil Action No. 2:96cv86 (W.D. Mich. 1997). In *Fayas*, the court excluded the testimony of a mechanical engineer essentially because the engineer had no experience in ladder design. However, the expert in *Fayas* was being offered to apply engineering principles as they applied to the design of the ladder. In other words, the opinion of the expert in *Fayas* would only apply when applied to a ladder. It would clearly be important, in such a case, for the expert to have worked specifically with ladders.

In the present case, Dr. Thames is being offered as an expert in polymer science. Essentially, polymer scientists study the synthesis of long chain molecules. It appears to the Court that whether Dr. Thames has studied polymer science in relation to ladders is of no consequence. He is not opining about any aspect of the ladder other than its molecular make up. Dr. Thames has simply examined a section of material and opined as to whether the polymers in

the material are properly adhered to a fiberglass reinforcement. This area appears to the Court to be an area for which Dr. Thames is perfectly suited, and thus the Court finds that Dr. Thames' qualifications are adequate to defeat the defendant's motion in this regard.

2. SPECULATION AND FLAWED METHODOLOGY

The defendant also objects to the testimony of Dr. Thames, arguing that "his opinions constitute speculation and his methodology is fundamentally flawed." The defendant supports this argument with an analysis of the four "*Daubert* factors."

The first *Daubert* factor concerns the existence of and potential for testing the theory or technique at issue. *Daubert*, 509 U.S. at 593. With regard to this factor, the defendant points out that ANSI A14.5 mandates that certain tests, including the flexural strength and modulus test, compressive strength and modulus test, tensile strength and modulus test, and notched izod impact strength test be performed to test the strength of the fiberglass rails. In addition, the defendant explains that ANSI A14.5 references ASTM which, in turn, provides the protocol for these tests. According to the defendant's expert the accident ladder exceeded all ANSI requirements under each of these tests.

The defendant also states that Dr. Thames only performed the flexural test, and his results show that the subject ladder fell within ANSI standards. However, Dr. Thames based his decision, that the ladder was defectively designed, largely on his findings using the

electron microscope. The defendant argues that basing findings on tests other than those set forth under ANSI when the subject ladder surpassed ANSI standards, constitutes a flaw in Dr. Thames' methodology.

Despite the defendant's contention, the Fifth Circuit has held "that compliance with [government standards] is not conclusive as a measure of defectiveness or unreasonable danger." *See Simien v. S.S. Kresge Co.*, 566 F.2d 551, 557 (5th Cir. 1978). However, the Fifth Circuit did go on to explain that when a product meets government standards, the plaintiff will have to produce *substantial* expert or lay evidence that the product is nevertheless unreasonably dangerous. *Simien*, 566 F.2d at 558.

In the present case, the plaintiff has put on evidence that despite meeting ANSI standards, an electron microscope reveals that, in Dr. Thames' opinion, the fiberglass was not properly adhered to the polymer matrix. For purposes of the present motion, the Court finds that the plaintiff has shown the existence of and potential for testing Dr. Thames' theory or technique. Using an electron microscope is a technique used by scientists throughout the field of polymer science. The Court does not find anything in Dr. Thames' methods that support exclusion with regard to the first *Daubert* factor.

The second *Daubert* factor concerns peer review and publication. *Daubert*, 509 U.S. at 593. The defendant argues that looking at the ladder at issue with the assistance of an electron microscope is not required by ANSI A14.5 or any other standard or code. The defendant then states, "Thus, the ESEM [electron microscope] has not been accepted by

the scientific or technical community as a test or standard in examining the strength or mechanical properties of a fiberglass rail." The Court is not willing to make such an assumption. The fact that a test is not required by government standards does not necessarily mean that it has not been "accepted" by the scientific field. In fact, it could mean that such a test is too easily met. On the other hand, a test may not be required because it is seen as too demanding. Perhaps a test could be seen as too costly, making the production of a useful product impractical to produce. Nevertheless, as discussed *supra,* government standards are not the final word in product liability actions.[1]

The defendant also points out that Dr. Thames has never published any articles, books, or treatises on ladders or fiberglass products. However, as discussed *supra*, Dr. Thames is being offered as an expert in polymer science. His opinions deal with the ladder at issue from a molecular stand point, particularly the structure as it pertains to the polymer matrix. Dr. Thames, as can be seen in his curriculum vitae, has written numerous articles on this topic. Therefore,

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1. This is not to say, however, that by meeting the standards, the defendant does not help its cause. In fact the Fifth Circuit reversed a jury verdict where a wooden ladder complying with or exceeding in its design all relevant OSHA and industry standards was found by the jury to be nevertheless unreasonably dangerous. *See Quinn v. Southwest Wood Products, Inc.*, 597 F.2d 1018 (5th Cir. 1979). The court noted that while meeting the government standards was not conclusive, the evidence put on by the plaintiff to counter the standards must be substantial. *Id.* at 1019. The court found the plaintiff's evidence to be "sketchy and meager," and therefore reversed the jury's verdict, holding that the trial court should have directed a verdict in favor of the defendant. *Id.* at 1024.

the Court finds that Dr. Thames' methods have been subjected to sufficient peer review and publication to satisfy the dictates of *Daubert.*

The third *Daubert* factor focuses on the known or potential rate of error and the existence and maintenance of standards controlling the operation of the technique. *Daubert,* 509 U.S. at 594. With regard to this factor, the defendant argues that Dr. Thames' reliance on the electron microscope is likely to lead to erroneous conclusions as it does not provide any data on the actual strength of the fiberglass.

However, a test does not have to produce numerical data to be useful. In Dr. Thames' deposition, he opined that for the ladder to be safe, there must be proper adhesion between the polymer and the fiberglass reinforcement. He also pointed out that the images produced via the electron microscope were almost identical to images reproduced in the textbook *Polymer Microscopy*, depicting no adhesion versus examples of adhesion. In the Court's opinion, such data is sufficient to comply with the third *Daubert* factor.

The fourth and final factor listed in the *Daubert* opinion concerns general acceptance. *Id.* The *Daubert* Court noted that wide spread acceptance can be an important factor in ruling particular evidence admissible, and a known technique that has been able to attract only minimal support within the community may be viewed with skepticism. The defendant points to the ANSI standards as the accepted manner in which ladders are to be tested. The Court agrees.

The Court also agrees, however, that an electron microscope is a generally accepted method used to examine polymer structure. Dr. Thames wanted to determine whether there was proper adhesion between the polymer and fiberglass, and thus he looked at sections of the ladder under an electron microscope. For purposes of such an analysis, the electron microscope is certainly generally accepted. Accordingly, the Court finds that the testimony of Dr. Thames regarding the ladder at issue is sufficient to surpass each factor set forth by the Supreme Court in *Daubert.*

3. COMPLIANCE WITH THE RULES OF DISCOVERY

Finally, the defendant asks the Court to strike the testimony of Dr. Thames because the plaintiff has not disclosed the compensation he is to be paid. The plaintiff has also failed to list any other cases in which Dr. Thames has testified as an expert or by deposition within the preceding four years. These disclosures are clearly mandated by the Uniform Civil Justice Expense and Delay Reduction Plan and the Federal Rules of Civil Procedure.

The Court notes that the plaintiff has provided no explanation in his response as to why he has not provided the information. However, it is well established that this Court wields broad discretion in discovery matters. *See, e.g., Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978); *Barrett v. Atlantic Richfield Co.*, 95 F.3d 375, 380 (5th Cir. 1996); *Coughlin v. Lee*, 948 F.2d 1152, 1159 (5th Cir. 1991). Accordingly, the Court hereby orders the plaintiff to make such disclosures within five (5) days of entry of this order. If such

disclosures are not made, the Court will revisit the motion at that time.

III. CONCLUSION

The defendant filed the present motion in order to exclude the testimony of the plaintiff's expert, Dr. Shelby Thames. Dr. Thames is being offered as an expert in polymer science. The defendant bases its argument on the premise that Dr. Thames is not qualified to testify as an expert in the present case. Additionally, the defendant argues that the testimony of Dr. Thames is based on speculation and flawed methodology.

The Court finds that the plaintiff's expert is eminently qualified to testify in the field of polymer science. Dr. Thames has a Ph.D. in chemistry and formed the Department of Polymer Science at the University of Southern Mississippi. The Court also finds that Dr. Thames' methodology holds up under a *Daubert* analysis. Dr. Thames will testify that the ladder at issue was defectively designed because the polymer matrix was not properly adhered to the fiberglass reinforcement. He formed this opinion by examining the material making up the ladder under an electron microscope. After applying the four *Daubert* factors to Dr. Thames' methodology, the Court is convinced that the plaintiff's expert should be allowed to testify. Accordingly, the Court finds that the defendant's motion should be, and is hereby, DENIED.

SO ORDERED, this the 19th day of May 1998.

s/ David Braulette
UNITED STATES DISTRICT JUDGE